

<sup>1</sup> See also *Children's Television Programming*, 6 FCC Rcd 2111, 2118 (1991) (*Children's Television Programming*), recon. granted in part, 6 FCC Rcd 5093, 5098 (1991) (*Children's Television Programming Recon.*).

or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gave for the overages.<sup>2</sup> Applying these criteria to the facts of station WCCB(TV)'s case, we stated that not only was the total number of violations very high, but noted that 14 of the commercial overages were program-length commercials.<sup>3</sup> Given this number and the nature of the station's overages, as well as the two-year period over which they occurred, we concluded that children had been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990.<sup>4</sup> In reaching that conclusion, we rejected the reasons North Carolina BP gave for the violations -- human error and inadvertence -- as bases for excusing its station's violations of the commercial limits. We also said that, though it implemented a plan to prevent future violations of the children's television commercial limitations, this did not relieve North Carolina BP of liability for the violations which had occurred.

3. In its Response, North Carolina BP contends that we erred in finding that six incidents described in station WCCB(TV)'s renewal application constituted program-length commercials. Those incidents involved a commercial for a Kids Fair, an annual event sponsored by station WCCB(TV), which: (1) mentioned the appearance of an "X-Men" character and a "Mighty Morphin Power Rangers" ("MMPR") comic book illustrator at the fair and included video clips from the "X-Men" and "MMPR" programs; and (2) aired during or adjacent to the "X-Men" or "MMPR" programs.<sup>5</sup> In support of its contention, North Carolina BP reiterates its previous arguments, which we rejected in *WCCB NAL*. Specifically, North Carolina BP maintains that the Kids Fair commercial did not promote any product associated with either program, and, therefore, did not convert the programs into program-length commercials. In addition, North Carolina BP claims the Commission has previously held that a product is associated with a program only when the link between the two is "clear and obvious." As the commercial at issue here was intended to promote the Kids Fair itself, North Carolina BP argues that the mere appearance of a character from the "X-Men" and an illustrator from the "MMPR" at the Kids Fair was insufficient to associate that event with the programs, and thereby create the requisite clear and obvious link between the two. By way of contrast, North Carolina BP distinguishes the Kids Fair incidents

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<sup>2</sup> See, e.g., *Stainless Broadcasting Co. (WICZ-TV)*, 10 FCC Rcd 9961 (1995); *KXRM Partnership (KXRM-TV)*, 8 FCC Rcd 7890 (1993) (*KXRM Partnership*).

<sup>3</sup> The remaining 57 violations consisted of 18 overages less than 30 seconds in duration, 23 overages 30 seconds or longer but less than one minute in duration, 10 overages one minute or longer but less than one and one-half minutes in duration, four overages one and one-half minutes in duration; one overage two minutes in duration and one overage two and one-half minutes in duration.

<sup>4</sup> Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394.

<sup>5</sup> To avoid being considered a program-length commercial, commercial matter related to a children's program must be separated from that program "by intervening and unrelated program material." *Children's Television Programming Recon.*, 6 FCC Rcd at 5099. To prevent confusion, the Commission "specifically note[d] that intervening commercial matter will not suffice as a separation device." *Id.* at 5099 n.89.

from the program-length commercials described in *UTV of San Francisco (KBHK-TV)*, 10 FCC Rcd 10986 (1995), which involved commercials for “Disney on Ice,” featuring the characters Chip and Dale, that aired adjacent to the “Chip and Dale’s Rescue Rangers” program. Along this line, North Carolina BP states that Disney sponsored both “Disney on Ice” and the “Chip and Dale’s Rescue Rangers” program, and that Chip and Dale were featured skaters in “Disney on Ice,” which promoted them and numerous other Disney characters. Accordingly, North Carolina BP concludes, “unlike the link between Kids Fair and ‘X-Men’ and ‘Power Rangers’ [‘MMPR’], the link between ‘Chip and Dale’s Rescue Rangers’ and Disney’s ice show is ‘clear and obvious.’”<sup>6</sup> Even if the six Kids Fair incidents were program-length commercials, North Carolina BP says that we miscounted the total number of program-length commercials reported in station WCCB(TV)’s renewal application as 14 rather than 13. Upon our *de novo* review, we find that one program-length commercial was inadvertently counted twice, so that the correct number of program-length commercials is 13, and the total number of violations for the purpose of assessing the appropriate sanction in this case is 70. See *infra* ¶ 10.

4. In addition, North Carolina BP challenges the fine imposed on station WCCB(TV) as disproportionate to fines that the Commission has imposed on other licensees for substantially similar conduct. To illustrate, North Carolina BP contrasts the \$25,000 forfeiture assessed against station WCCB(TV) for its violations of the children’s television commercial limits with *BSP Broadcasting, Inc. (KJTL-TV)*, 9 FCC Rcd 1829 (MMB 1994), *aff’d*, DA 99-1545 (MMB released August 6, 1999) (*BSP Broadcasting*), where a \$15,000 forfeiture was assessed for 70 violations of the commercial limits, and *Koplar Communications (KPLR-TV)*, 8 FCC Rcd 7884 (1993) (*Koplar*), where a \$30,000 forfeiture was assessed for 197 violations of the commercial limits, almost three times the number of violations reported by station WCCB(TV). This precedent, North Carolina BP insists, demonstrates that the Commission has treated station WCCB(TV) more harshly than other stations. Further, North Carolina BP maintains that such disparate treatment has repeatedly been declared illegal.

5. North Carolina BP also believes that, in assessing the forfeiture amount, the Commission failed to give appropriate weight to the fact that 54 of the 70 violations occurred “within two years after the new children’s programming limits were enacted, a period of time during which broadcasters were still familiarizing themselves with the new rules and learning how to comply.” North Carolina BP alleges that the Commission’s failure to consider the timing of the overages as a mitigating factor contradicts precedent wherein the Commission purportedly granted, without the imposition of any monetary forfeiture, the license renewals of other stations reporting overages which occurred soon after the children’s programming rules were enacted. In declining to fine those broadcasters, North Carolina BP states, the Commission “recognized that a period of trial and error is to be expected when a new rule is promulgated and that, therefore, it should be lenient regarding early violations of the children’s programming limits.”<sup>7</sup> As a similarly-situated

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<sup>6</sup> Response at p.4.

<sup>7</sup> Response at p.6.

party, North Carolina BP argues that it should be granted leniency for the 54 violations reported by station WCCB(TV) which occurred during "a trial and error period." North Carolina BP further contends that if one overage can be excused because a broadcaster is still learning to comply with a new rule, then all broadcasters learning to comply should be similarly excused, regardless of the number of overages. For all of these reasons, North Carolina BP concludes that the fine assessed against its station is erroneous and should be reduced.

## DISCUSSION

6. As an initial matter, we believe we correctly concluded that the Kids Fair incidents described in station WCCB(TV)'s renewal application constituted program-length commercials. In establishing its policy on program-length commercials, the Commission stated that it was addressing "a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter."<sup>8</sup> Accordingly, in interpreting and applying the Commission's policies regarding program-length commercials, we are concerned about and dealing with the cognitive abilities of young children, not adults.<sup>9</sup> To this end, we have consistently held that, where a commercial announcement is primarily for a product otherwise unrelated to a program, but that announcement also includes references to or offers of products which are related to the program, than the broadcast of that commercial announcement during or adjacent to the program to which the included products relate will render that program a program-length commercial.<sup>10</sup>

7. In *WCCB NAL*, we acknowledged that the product directly promoted in the commercial at issue was the Kids Fair, but determined that the commercial also included a reference to another product, the appearances of the "X-Men" and the "MMPR" illustrator as attractions at the fair. In reaching that determination, we stated that:

- (i) the appearance/performance by the "X-Men" character and the "MMPR" illustrator was clearly presented in the advertisement as one of the attractions at the "Kids Fair;"
- (ii) the appearance by the "X-Men" character and the "MMPR" illustrator and the inclusion of clips from the programs in the advertisement clearly were intended to, and did, promote their appearance at the "Kids Fair;" and (iii) any appearance/performance by an "X-Men" character and an "MMPR" illustrator is clearly related to the programs "X-Men" and "MMPR."<sup>11</sup>

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<sup>8</sup> *Children's Television Programming*, 6 FCC Rcd at 2118.

<sup>9</sup> See, e.g., *Scripps Howard Broadcasting Company (KNXV-TV)*, 9 FCC Rcd 2547 (MMB 1994), *aff'd*, 12 FCC Rcd 19504, 19505 (MMB 1997) (*Scripps Howard*).

<sup>10</sup> See, e.g., *Scripps, id.*; *Ramar Communications, Inc. (KJTV-TV)*, 9 FCC Rcd 1831 (1994); *Quad Cities Television (KLJB-TV)*, 9 FCC Rcd 1711 (1994).

<sup>11</sup> *WCCB NAL*, 13 FCC Rcd at 3451-2.

In view of these same facts, we disagree with North Carolina BP's contention that the link which it concedes existed between the Kids Fair and "X-Men" and "MMPR" programs was not clear and obvious, particularly when the Kids Fair commercial both mentioned the appearance of the "X-Men" character and "MMPR" illustrator as an attraction at the fair and included video clips from the programs. Unlike North Carolina BP, moreover, we find no meaningful distinction between the circumstances resulting in the Kids Fair/"X-Men"/"MMPR" program-length commercials, and those resulting in the "Disney on Ice"/Chip and Dale program-length commercials described in *UTV of San Francisco*. Both cases involved commercials for events which explicitly mentioned the appearance/performance of program-related characters/illustrator as attractions at the events. In addition, the commercials in each case ran during or adjacent to the related programs. Based on these circumstances, where there is clear potential for confusion in the minds of young children, the Commission's program-length commercial policy is applicable. Therefore, we believe we acted appropriately and consistent with Commission precedent in finding that the broadcast of the Kids Fair commercial during or adjacent to the "X-Men" or "MMPR" programs resulted in program-length commercials.

8. We also disagree with the proposition that North Carolina BP is entitled to leniency because 54 of the 70 violations occurred within two years after the children's television commercial limits were adopted. North Carolina BP cites no cases or authority in support of its argument that the Commission has previously excused violations based on "a trial and error" period *vis-a-vis* Section 73.670 of the Rules. Rather, the Commission has consistently considered *all* violations of the children's television commercial limits occurring *on and after* January 1, 1992, the effective date of Section 73.670, to determine the appropriate sanction in a given case.<sup>12</sup> Therefore, we are not persuaded by North Carolina BP's argument that any overages occurring during "a trial and error period" after Section 73.670's effective date should be excused because broadcasters were still learning to comply with that new rule. In fact, licensees were afforded an additional period of time in which to familiarize themselves with Section 73.670 and hone their compliance plans when we delayed the effective date of that rule from October 1, 1991, to January 1, 1992.<sup>13</sup> At that time, we noted that, in the context of enforcement action for violations of the limits, the Commission would be unlikely to be sympathetic to claims of transitional difficulties. For these reasons, we rejected a similar argument proffered in *Koplar*, stating that "the fact that the majority of your commercial overages occurred at the beginning of the period during which the commercial limits went into

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<sup>12</sup> See, e.g., *Jefferson-Pilot Communications Company (WBTV-TV)*, 12 FCC Rcd 2526 (1997) (79 overages occurring between January 18, 1992, and August 19, 1995, considered in assessing \$20,000 forfeiture); *UTV of San Francisco*, 10 FCC Rcd 10987 (218 overages occurring between January 2, 1992, and May 7, 1993, considered in assessing \$40,000 forfeiture); *Scripps Howard Broadcasting Co. (KNXV-TV)*, 9 FCC Rcd 2547 (1994) (five overages occurring in January and February 1992, considered in assessing \$10,000 forfeiture); and *Paramount Stations of Houston, Inc. (KTXH-TV)*, 9 FCC Rcd 140 (1993) (132 overages occurring in 1992 considered in assessing \$80,000 forfeiture).

<sup>13</sup> See *Children's Television Programming*, 6 FCC Rcd 5529, 5530 n.10 (1991).

effect does not mitigate the extremely high number of commercial overages.”<sup>14</sup> In light of these considerations, we likewise reject the two year “trial and error period” suggested by North Carolina BP as a basis for excusing the 54 overages reported by station WCCB(TV), which occurred regularly beginning April 1, 1993, through and including September 17, 1993.<sup>15</sup> We conclude, moreover, that our consideration of the 54 overages reported by North Carolina BP was consistent with Commission practice and policy.

9. Regarding North Carolina BP’s argument that the Commission accorded it disparate treatment when assessing the \$25,000 forfeiture against station WCCB(TV) as compared to the \$15,000 forfeiture assessed against station KJTL-TV in *BSP Broadcasting* and the \$30,000 forfeiture assessed against station KPLR-TV in *Koplar*, we reject North Carolina BP’s attempt to make a violation-by-violation comparison with those cases. As stated in ¶ 3, *supra*, we note that the total number of violations for the purpose of assessing the appropriate sanction in this case is 70 as opposed to 71. Even with the corrected number of violations in this case, we still believe the \$25,000 forfeiture assessed for station WCCB(TV)’s 70 violations of the commercial limits is proportionate to, and not inconsistent with, the forfeitures assessed against stations KJTL-TV and KPLR-TV. In *BSP Broadcasting*, station KJTL-TV reported 70 violations of the commercial limits, which occurred over a nine-month period. The violations were attributed to inadvertence, human error and commercial make-goods, and the licensee stated that it had adopted procedures to ensure future compliance. In *Koplar*, station KPLR-TV reported 197 violations of the commercial limits, which occurred over approximately an eight-month period. The violations in that case were essentially attributed to human error, and the licensee described the steps it had taken to prevent violations from occurring in the future. When compared, it appears that stations WCCB(TV), KJTL-TV and KPLR-TV offered similar reasons for their respective violations, and that the licensee in each case claimed to have implemented procedures to ensure future compliance with the commercial limits. Unlike station WCCB(TV), however, stations KJTL-TV and KPLR-TV reported no program-length commercials.

10. The Commission has routinely assessed higher forfeitures for program-length

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<sup>14</sup> 8 FCC Rcd at 7885.

<sup>15</sup> In *Children's Television Programming*, the Commission specifically recognized that licensees may experience “occasional emergency scheduling change[s],” which would be taken into consideration in determining whether “extenuating circumstances” mitigated any resulting children’s television commercial limits violations. 6 FCC Rcd at 2126 n.123. On reconsideration, the Commission affirmed this policy, stating that “where the facts demonstrate that a slight overage is caused by a last-minute emergency scheduling change, we will consider such a lapse to be ‘*de minimis*.’” *Children's Television Programming Recon.*, 6 FCC Rcd at 5096. North Carolina BP has not asserted that any of station WCCB(TV)’s violations occurred as a result of a last-minute emergency scheduling change. Further, lest there be any misunderstanding or confusion with respect to whether the Commission has excused violations in a particular case, we emphasize, here, that the Commission has not excused those violations it has found *de minimis* or for which it has issued a letter of admonition. Rather, the Commission has merely determined that, based on its evaluation of the circumstances of that particular case under the relevant criteria, *see supra* ¶ 2, the violations do not rise to the level warranting imposition of a monetary forfeiture.

commercials than for a greater number of conventional overages.<sup>16</sup> We find that although the total number of program-length commercials for the purpose of assessing the appropriate sanction in this case is 13 as opposed to 14, the \$25,000 forfeiture against station WCCB(TV) is still warranted. The fact that there is one less program-length commercial than previously counted does not justify a decrease in the forfeiture amount assessed against station WCCB(TV), particularly in light of the many program length commercials reported. Because of its program-length commercials, station WCCB(TV) was assessed a higher forfeiture than station KJTL-TV for the same number of total violations, and a similarly significant forfeiture amount as compared to station KPLR-TV, which reported a higher number of total violations. Furthermore, we believe that the instant case is similar to another case in which the Commission assessed a \$25,000 forfeiture, *KXRM Partnership*, see *supra* n.2. There, station KXRM-TV reported 87 violations of the commercial limits, which occurred over a period of approximately eight months. Like North Carolina BP, the licensee of station KXRM-TV attributed the violations to inadvertence and human error and stated that it had implemented a program to ensure compliance with the commercial limits. However, unlike station WCCB(TV), station KXRM-TV reported no program-length commercials, albeit it did have a higher number of total violations than station WCCB(TV). In view of *BSP Broadcasting*, *Koplar* and *KXRM Partnership*, and given the totality of the facts and circumstances in this case, we continue to believe that the \$25,000 forfeiture assessed for station WCCB(TV)'s violations was appropriate and consistent with Commission policy.

11. The Communications Act does not require the Commission to attribute monetary liability to each separate violation.<sup>17</sup> Further, the Commission has a great deal of discretion under Section 503 of the Communications Act in determining forfeiture amounts.<sup>18</sup> Such discretionary authority holds particular relevance given the different factors involved in compliance with the children's television commercial limits (*e.g.*, number, type and duration of overages, period of time over which the violations occurred, extent of compliance program), making it impossible to devise a precise formula to calculate forfeiture amounts. The Commission, moreover, "is not bound to deal with all cases at all times as it has dealt with some that appear comparable."<sup>19</sup> Therefore, we see no reason to disturb our decision in *WCCB NAL*.

12. Accordingly, IT IS ORDERED THAT the request of North Carolina Broadcasting Partners for reduction of the forfeiture assessed in *North Carolina Broadcasting Partners (WCCB(TV))*, 13 FCC Rcd 3450 (1997) IS DENIED.

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<sup>16</sup> See, *e.g.*, *Channel 39 Licensee, Inc. (WDZL(TV))*, 12 FCC Rcd 14012, 14015 n.3 (1997).

<sup>17</sup> See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991); *Niagara Frontier Broadcasting Corp.*, 51 FCC 2d 525 (1975), *aff'd*, 36 RR2d 1584 (1976), *recon. granted in part*, 38 RR2d 1004 (1976).

<sup>18</sup> *Triple X Broadcasting Co., Inc.*, 46 RR2d 788, 789 (B/C Cur. 1979), *citing Brennan Broadcasting Co.*, 25 FCC 2d 400, 405 (1970).

<sup>19</sup> *Triple X Broadcasting*, *supra*, *citing Continental Broadcasting Co. v. FCC*, 439 F.2d 580, 583 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 905 (1971).

13. IT IS FURTHER ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), North Carolina Broadcasting Partners, licensee of station WCCB(TV), Charlotte, North Carolina, SHALL FORFEIT to the United States the sum of twenty-five thousand (\$25,000) for willful and repeated violations of Section 73.670 of the Commission's Rules, 47 C.F.R. §73.670. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission at the address indicated in the attachment to this Memorandum Opinion and Order and Forfeiture Order.

14. IT IS FURTHER ORDERED That the Mass Media Bureau send by Certified Mail - Return Receipt Requested - copies of the Memorandum Opinion and Order and Forfeiture Order to North Carolina Broadcasting Partners.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary